Supreme Court, U.S.
FILED
AUG 24 1993
OFFICE OF THE CLERK

No. 92-2059

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JACK GERRITSEN,

Petitioner,

v.

CONSULADO GENERAL DE MEXICO, *et al.*,

Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF FOR THE MEXICAN RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court below erred in affirming the district court's ruling that the service of process on the Mexican Consulate General and members of the Consulate was void.

2. Whether the court below erred in affirming the district court's holding that a Consul General and a Vice-consul of Mexico were immune from suit under the Vienna Convention on Consular Relations for acts performed in their official capacity.

PARTIES TO THE PROCEEDINGS

The petitioner is Jack Gerritsen.

The Mexican respondents are:

The Consulate General of Mexico in Los Angeles
Consul General Javier Escobar y Cordova
Consul General Agustin Garcia Lopez Santaolalla
Vice-consul Enrique Silva Guzman
Consular employee Salvador Uribe

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 989 F.2d 340 (1993). The memorandum of decision and order of the United States District Court for the Central District of California (Pet. App. 24-39) is reported at 721 F. Supp. 253 (1988).

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1993. The petition for a writ of

certiorari was filed on June 25, 1993. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

TREATIES, CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes claimed by the petitioner to be involved in the case are reproduced in the appendix to the petition (Pet. App. 67-72).

Respondents believe that the following provisions of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820 are relevant to the case:

Art. 5:

Consular functions consist in:

> (a) protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law;
>
> . . . . .
>
> (m) performing any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State.

Art. 31:

Inviolability of Consular Posts:

1. Consular premises shall be inviolable to the extent provided in this Article.

2. The authorities of the receiving State shall not enter that part of the consular premises which is used exclusively for the purpose of the work of the consular post except with the consent of the head of the consular post or of his designee or of the head of the diplomatic mission of the sending State. The consent of the head of the consular post may, however, be assumed in case of fire and other disaster requiring prompt protective action.

Art. 43:

1. Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions.

. . . . .

STATEMENT

Petitioner ("Gerritsen"), acting pro se, brought suit against the Consulate General of Mexico in Los Angeles ("Consulate"), Consuls General Javier Escobar y Cordova ("Consul Escobar") and Agustin Garcia Lopez Santaolalla ("Consul Garcia"), Vice-consul Enrique Silva Guzman ("Vice-consul Silva"), and consular employee Salvador Uribe ("Uribe")[1] for various torts and civil rights violations. The jurisdiction of the district court was originally invoked under 28 U.S.C. §1343.

[1] Collectively referred to as "Mexican respondents."

Gerritsen's claims arose out of his protest activities near the Mexican Consulate between 1982 and 1984 and the individual respondents' efforts to stop these activities. Gerritsen routinely chose the Mexican Consulate, with its long lines of persons seeking visas and other consular services, as a site to express his extremely critical views of the Mexican government. (Pet. App. 3). He frequently distributed pamphlets, gave speeches (sometimes using a loudspeaker or megaphone) and harassed officials on or near the grounds of the Consulate with a view to disrupting consular business. (Pet. App. 4).

Gerritsen's complaint, filed in 1985, alleged that Mexican consular officials conspired with the City of Los Angeles and its employees, park security officials, and the Los Angeles Police Department to deprive him of his first amendment rights to distribute political literature, engage in political speech, and participate in other expressive activities. (Pet. App. 3). The complaint further alleged that the consular officials and employees deprived him of other constitutional rights by assaulting him, falsely imprisoning him and restraining him in an effort to curtail his disruptive activities. (Pet. App. 4).

The district court initially dismissed the complaint for lack of subject matter jurisdiction under §1343 and Gerritsen appealed. Although the court below sustained the district court's ruling that it lacked subject matter jurisdiction under §1343, it reversed the dismissal against the Consulate and the Consular officials and employees noting that the district court's competence was "not limited to the jurisdictional statutes identified in the complaint." (Pet. App. 55). In the court's view, the Foreign Sovereign Immunities

Act ("FSIA") 28 U.S.C. §1330,[2] provided subject matter jurisdiction over the claims against the Consulate, *qua* Consulate, and 28 U.S.C. §1351 furnished the jurisdictional predicate for the suit against the members of the Consulate. (Pet. App. 55). The court remanded the case with instructions to allow Gerritsen to amend his complaint, which Gerritsen did in October and again in December 1987.[3]

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[2] In its first opinion in this case, the court of appeals expressed the view that the Mexican Consulate was a "separate legal person" and "an organ of a foreign state" within the meaning of §1603(b) of the FSIA. (Pet. App. 60-61).

The view that a consular mission is a separate juristic entity, capable of suing or being sued in its own name, finds no support in customary international law, in the Vienna Convention, or in the two other international accords in force between the United States and Mexico governing consular relations—the Pan-American Consular Convention, February 20, 1928, 47 Stat. 1976, T.S. No. 843, and the United States-Mexico Consular Convention, August 12, 1942, 57 Stat. 800, T.S. No. 985. Rather, consular (as well as diplomatic) missions are administrative subdivisions of those departments of states responsible for the conduct of their foreign relations. *See, e.g., Gray v. Permanent Mission of the People's Republic of the Congo*, 443 F. Supp. 816, 820 (S.D.N.Y) (foreign state's U.N. mission is not a separate "agency or instrumentality" of the sending state; in consequence service is governed by §1608(a) of the FSIA), *aff'd*, 580 F.2d 1044 (2d Cir. 1978).

[3] Gerritsen filed a first amended complaint in October 1987, and added additional defendants, including the FBI. The suit against the FBI was dismissed on December 7, 1987, and Gerritsen was granted leave to amend. (Pet. App. 18).

Thereafter, Gerritsen filed a second amended complaint and added as defendants FBI Director William Webster and FBI Special Agents Carlos Berrios and Richard Schneider. (Pet. App. 19). The suit against the three individual federal defendants was dismissed on February 8, 1988, on the grounds, among others,

On the Mexican respondents' motion for summary judgment, the district court, on September 21, 1988, dismissed the complaint against the Consulate for failure to perfect service. The district court held that the Consulate is not a "department or ministry which acts and is suable in its own name"; that service on the Consulate was governed by the FSIA; and that Gerritsen had failed to comply with the service provisions of that Act. (Pet. App. 35-36).

The district court also dismissed the complaint against Consul Garcia and staff employee Uribe for failure to effect proper service on these defendants in their individual and official capacity.

Finally, the Court dismissed the complaint against Consul Escobar and Vice-consul Silva for lack of subject matter jurisdiction under the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820 ("Vienna Convention"). (Pet. App. 36-39). Here, subject matter jurisdiction turned on whether the actions taken by these officials to curtail Gerritsen's protest activities were "acts performed in the exercise of consular functions" within the purview of the Vienna Convention. (Pet. App. 36). Given Gerritsen's lack of evidentiary support for his allega-

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others, that they had not been served. (*Id.*)

FBI Agent Barrios was properly served on March 17, 1988, but the suit against him was again dismissed on October 30, 1989, on statute of limitations grounds. (Pet. App. 17-23).

The court below affirmed the dismissal of FBI Agent Barrios in the decision under review. (Pet. App. 6-8). Although Gerritsen's petition does not challenge that ruling, he incorrectly lists FBI Agent Barrios as a respondent. (Pet. ii).

tions,[4] the court found that the actions taken by Consul Escobar and Vice-consul Silva were in furtherance of legitimate consular functions and, therefore, these individuals were immune from suit under Article 43 of the Vienna Convention. (Pet. App. 36-39).

Following the district court's dismissal of the complaint against the remaining defendants—none of whom are respondents in this Court—Gerritsen appealed the grant of summary judgment in favor of the Mexican defendants.

The court below affirmed the district court in all respects. It held—

1) that the district court did not err in finding that Gerritsen failed to perfect service on Consul Garcia, consular employee Uribe (Pet. App. 9), and the Consulate itself (Pet. App. 9-10);

2) that the district court did not err in holding that it lacked subject matter jurisdiction over Consul Escobar and Vice-consul Silva. These consular officials were immune from suit under the Vienna Convention because they had acted in order to maintain the peace and protect the premises of the Consulate. These were legitimate consular functions under Article 43 of the Vienna Convention and immune from review by U.S. courts (Pet. App. 12-14); and

3) that, as to the claim against the Consulate, Gerritsen's service was insufficient because he attempted

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[4] While the Mexican respondents' summary judgment motion was pending, the district court ordered Gerritsen to specify and elaborate upon his allegations against Escobar and Silva. (Pet. App. 11). Despite these orders, Gerritsen failed to provide more detailed information.

to serve the consulate by mailing an untranslated copy of the complaint to the President of Mexico. (Pet. App. 9-10).

REASONS FOR DENYING THE WRIT

1. Petitioner asks the Court to grant certiorari to review three questions.

The first question invites the Court to resolve a perceived conflict between the Ninth and Fifth Circuits regarding when a law enforcement agency's (such as the FBI's) activity may become actionable. The district court dismissed the FBI as a defendant on the ground that the FBI was not a suable entity and was immune from suit. The court below affirmed on the ground that governmental departments and agencies are immune from suit absent express statutory authorization. (Pet. App. 5-6). Since the court below did not address the issue that petitioner seeks to tender, the question presented is not properly before the Court. *Delta Airlines v. August*, 450 U.S. 346, 362 (1981).[5]

2. Nothing in the decision of the court below gives support to the second question presented. The opinion does not consider "whether immunity attaches to private acts of foreign sovereign agents to protect the dignity and premises of a foreign consulate . . ." (second question presented). Rather, the court's decision rests squarely on the finding that consular employee Uribe—who according to the complaint, committed

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[5] The Mexican respondents were informed that, in a letter to the Clerk of this Court, dated July 26, 1993, the Solicitor General waived the United States' right to file a brief in opposition to the petition.

acts of assault and false imprisonment—was properly dismissed from the suit for lack of proper service. (Pet. App. 11 n.5). Consul Escobar and Vice-consul Silva who were alleged to have committed acts of verbal harassment and threats against Gerritsen, were dismissed on grounds of immunity from suit under the Vienna Convention. (*Ibid.*) The court emphasized that "[d]espite orders from the district court to specify and elaborate upon these allegations . . . [of harassment and threats], Gerritsen never provided more detailed information." (Pet. App. 11). In consequence the court concluded—"based on the record before us (which Gerritsen had the opportunity to develop between 1985 and 1988)"—that Consul Escobar and Vice-consul Silva's actions "constitute[d] reasonable efforts to effectuate the consular function of maintaining the dignity and safety of the Consulate," and that such acts were not actionable under the Vienna Convention. (Pet. App. 14). In light of the record established in the district court, the court of appeal's decision is plainly correct and presents no occasion for review by this Court.

3. The third question presented seeks review of the rulings below that service in a suit naming a foreign consulate must comport with the service provisions of §1608(a) of the FSIA governing service on foreign states (as distinguished from service on independent "agencies and instrumentalities" of foreign states).[6]

On this appeal, the court below affirmed the district court's ruling that in a suit naming a foreign con-

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[6] In presenting this question as framed, Gerritsen may have been mislead by the Circuit court's erroneous dictum on the first appeal in this case—see n.2, *supra*—that the Consulate is a separate juristic entity, and that it can be sued in its own right.

sulate as defendant, the real party in interest is the foreign state that maintains the consular mission in this country; that subject-matter jurisdiction in such a suit is governed by the FSIA and will lie only against the state itself; and that service of process in such a suit must comply with the mandate of the FSIA prescribing service on foreign states.[7]

The court below determined that Gerritsen's attempted service of the complaint on Mexico was void because he had sought to effect service on the Consulate by causing a copy of the complaint to be mailed to the *President of Mexico*. Even if the President were deemed to be "the head of the Ministry of Foreign Affairs," Gerritsen's service was fatally defective because he did not send a translation of the complaint. (Pet. App. 9-10). The decision below is plainly correct and, in consequence, the third question similarly presents no occasion for review by the Court.[8]

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[7] The court below pointed out that of the four methods of service on a foreign state spelled out in 28 U.S.C. §1608(a), only the third method was applicable to this case:

> (3) if service cannot be made under paragraphs (1) [in accordance with a special arrangement] or (2) [in accordance with an international convention], [service must be made] by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned. (Pet. App. 10).

[8] Although not set forth in the questions presented, Gerritsen also attempts to challenge the court's affirmance of the district court's ruling that no valid service was effected on Consul Garcia and consular employee Uribe (Pet. 22-28). The opinion of the

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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court below details the flaws in Gerritsen's attempts to serve Garcia and Uribe in their individual as well as their official capacities. (Pet. App. 9). Noting that Gerritsen did not dispute the district court's factual conclusions regarding the manner of service, the court below affirmed the dismissal of the suit against these two defendants. (Pet. App. 9). Therefore, this aspect of the Circuit court's decision, too, presents no basis for review by the Court.